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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1906.

No. 226.

CITY OF CHICAGO,
Appellant,

vs.

DARIUS O. MILLS and PEOPLES GAS LIGHT & COKE COMPANY,
Appellees.

BRIEF AND ARGUMENT IN BEHALF OF APPELLANT.

JAMES HAMILTON LEWIS,
Corporation Counsel.

HENRY M. ASHTON AND
DAVID K. TONE,
Special Counsel.

Geo. Hornstein Co., Printer, Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1906.

No. 286.

CITY OF CHICAGO,
Appellant,

vs.

DARIUS O. MILLS and PEOPLES GAS LIGHT & COKE COMPANY,
Appellees.

BRIEF AND ARGUMENT IN BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

On October 15, 1900, the City Council of the City of Chicago passed an ordinance providing that on and after January 2, 1901, no gas company doing business within the City of Chicago should charge to exceed the sum of 75 cents per thousand cubic feet for gas sold to consumers within said City or to the City of Chicago. (Rec., p. 78.)

At the time of the passage of the ordinance above described, the appellee, the Peoples Gas Light and

Coke Company, was charging to its consumers One Dollar per one thousand cubic feet for gas. (Rec., p. 78.)

On the 21st day of December, 1900, the Peoples Gas Light and Coke Company filed a bill in equity in the Circuit Court of the United States, for the Northern District of Illinois against the City of Chicago for the purpose of restraining said City from enforcing said ordinance. (Rec., p. 280.) Said bill of complaint charged that by virtue of the charter of the Peoples Company, granted to it by the legislature of the State of Illinois on the 12th of February, 1855, and as amended by the Act of February 7, 1865, and the acceptance of said charter, and the construction of its gas plant, the Peoples Company had entered into a contract with the State of Illinois, by the terms of which it should not be compelled to furnish gas to consumers at a less rate than Three Dollars per thousand cubic feet. (Rec., p. 283.) Copies of the legislative acts so relied upon were set forth in said bill of complaint. (Rec., pp. 280 and 281.) Said bill also charged (Rec., p. 290) that the legislature of the State of Illinois had not delegated to the City of Chicago the power to pass an ordinance regulating the price of gas and for that reason said ordinance was null and void.

On January 2, 1901, a restraining order was issued against the City of Chicago, enjoining it from enforcing the terms of said ordinance until the further order of the court.

On the 3rd day of January, 1902, the City of Chicago filed a general demurrer to said bill of complaint (Rec., p. 294), and on the 15th day of January, 1902, Judge Grosscup handed down an opin-

ion, sustaining said demurrer (Rec., p. 298). Judge Grosscup, in his opinion, held that a proper construction of the charter of the Peoples Company did not give the Peoples Company any immunity from regulation by the State of the price to be charged for gas, but on the contrary, the original charter, as well as the merger act of 1897, both recognized the right and power of the State to regulate gas rates. Judge Grosscup, in the above opinion, held that inasmuch as the alleged impairment of contract rights by the complainant had not been established, a federal court was without jurisdiction. He further held that even should it be conceded that the State of Illinois had not delegated to the City of Chicago the power to regulate the price of gas, that fact would not confer upon a federal court jurisdiction, for the Peoples Gas Light and Coke Company and the City of Chicago were both citizens and residents of the State of Illinois and it was the duty of the complainant to seek redress in the State courts for acts done by the City of Chicago in violation of State law. Speaking on this question, Judge Grosscup said (Rec., p. 301):

> "If I hold that, under existing legislation, the City has not been delegated with the State's power to regulate rates, it is manifest that the real and adequate reason for annulling the ordinance complained of would be, not any provision of the Federal Constitution, but this lack of power, as shown in the State legislation. On the other hand, if I should hold that the State's power had been delegated to the City, then, according to the reasoning already stated, the injunction prayed for would be refused. Whichever way one looks at this phase of the case, it turns, not on Federal Constitutional law, but

upon the interpretation of the State statutes, and is not, therefore, within the meaning of the judiciary act, a case involving the construction of the laws or the Constitution of the United States. If complainant's substantial remedy against the ordinance complained of is lack of power in the City, its relief must be found in the State courts."

An amended bill of complaint was filed, embodying substantially the allegations of said original bill, to which a demurrer was also filed, and on the 30th day of July, 1902 (Rec., p. 365), a decree was entered in the above cause dismissing the bill of complaint of the Peoples Company for want of jurisdiction and an appeal was allowed the Peoples Company to this court, said appeal to operate as a supersedeas, upon the defendant filing a bond in the sum of $600,000, and the restraining order then in force to be continued until the decision of said cause by this court. Said bond was duly filed on September 15, 1902. (Rec., p. 366.)

On the 5th day of December, 1903, an order was entered *nunc pro tunc* as of July 30, 1902, amending the final decree of July 30, 1902, in the above cause by striking out the words "dismissed for want of jurisdiction," and inserting in lieu thereof, "dismissed upon the merits as to the alleged contract rights of the complainant, but without prejudice to any other suit in respect to the question of power of the City Council under the laws of the State of Illinois."

After the opinion of Judge Grosscup had been handed down, holding that the Peoples Company had no contract rights with the State of Illinois, and

that relief against the alleged want of power in the City to pass the ordinance in question "must be found in the State courts," the Peoples Company at once set about to circumvent that holding and obtain a footing in the Federal Court. It was discovered that D. O. Mills, a resident and citizen of the State of California, then living in New York City, and a friend of Anthony N. Brady, the vice president and a director of the Company, could be used for the purpose of filing such a bill.

Pursuant to said scheme, and on the 21st of January, 1903, D. O. Mills, the complainant in the case at bar, paid William D. Guthrie, his solicitor, the sum of $5,000 for the purpose of commencing a suit in the name of said Mills against the City of Chicago and the Peoples Company to restrain the City from enforcing the 75 cent gas ordinance, and said Peoples Company and its officers from complying with the same. (Print. Rec., p. 186; Orig., p. 328.)

On the 14th day of May, 1903, A. N. Brady, the vice-president and director of the Peoples Company, repaid to Mr. Mills the $5,000 check paid by Mr. Mills to Mr. Guthrie on January 21, 1903. (Rec., p. 186.) Less than a month thereafter and on June 8, 1903, the complainant, D. O. Mills, filed the original bill of complaint in the case at bar (Rec., p. 2), alleging that he was a resident and citizen of the State of California and that he brought the bill of complaint in behalf of himself and all the stockholders of the Peoples Company against the City of Chicago and said Company.

Said bill of complaint set forth the same legislative acts of February 12, 1855, and February 7, 1865 (Rec., pp. 2 and 3), under which the Peoples Com-

pany was incorporated, that were set out in the bill of the Peoples Company, and also alleged in the same way that the ordinance of October 15, 1900, impaired the obligations of the contract entered into between the State of Illinois and the Peoples Company, by virtue of the passage of said Acts, the acceptance of the same by the Peoples Company, and the erection of its plant pursuant thereto (Rec., p. 14; Orig., p. 24). Said bill also alleged in the same way that the Legislature of the State of Illinois had not delegated to the City Council of the City of Chicago the power to regulate the price of gas and that for that reason said ordinance was void. (Rec., p. 14; Orig., p. 24.)

The bill further recited (Rec., p. 16) the commencement of the bill of complaint of the Peoples Company against the City of Chicago on December 21, 1900, the decree of the Circuit Court of July 30, 1902, dismissing said bill, the appeal of the Peoples Company from that decree to this court, and the fact that pending said appeal, the said Circuit Court continued in force the preliminary injunction theretofore issued, until said case had been decided by this court. The bill further charged (Rec., p. 17) that on the 16th day of December, 1902, D. O. Mills, the complainant, addressed a letter to the Board of Directors of the Peoples Company, requesting them to institute a suit in the name of the corporation to contest the validity of said 75 cent gas ordinance. The bill further charged "that said board refused and still refuses so to do on the alleged ground that any further litigation with the City of Chicago than that already pending would be detrimental to the best interests of the Company."

The bill further charged that on February 10, 1903, a similar demand for the commencement of a suit was made upon the stockholders of the Peoples Company, and that said stockholders refused to bring said suit for the same reasons that had been previously assigned by the Board of Directors.

Said bill of complaint prayed that the City of Chicago might be enjoined from enforcing said ordinance of October 5, 1900, and that the Peoples Company and its officers and agents might be enjoined from complying with the provisions thereof. Before the application for a preliminary injunction in the suit of complainant Mills had been heard or considered by the court, and at least as early as July or August, 1903, William D. Guthrie, counsel for Mills the stockholder, was retained as counsel for the Peoples Company to argue in this court the appeal of that Company from the decree of said Circuit Court dismissing the Peoples Company's bill (Rec., p. 258).

On December 1, 1903, William D. Guthrie entered his appearance jointly with James F. Meagher, as solicitors for the Peoples Company in said case of the *Peoples Gas Light and Coke Company* v. *City of Chicago*, in this court. (Rec., p. 262.) On January 20, 1904, the case of the *Peoples Company* v. *The City of Chicago, supra*, was argued orally in this court by William D. Guthrie as counsel for complainant, and on April 4, 1904, this court handed down an opinion and judgment, affirming the judgment of the Circuit Court, holding that the ordinance of October 15, 1900, did not impair any contractual obligations between the City of Chicago and the Peoples Company and that therefore a Fed-

eral Court had no jurisdiction over said cause. *Peoples Gas Light and Coke Company* v. *City of Chicago,* 194 U. S., 1.

Four days after the appearance of William D. Guthrie jointly with James F. Meagher, as solicitors for the complainant, had been entered in this court, and on December 5, 1903, the application of complainant D. O. Mills for a preliminary injunction on the stockholders' bill came on for hearing before Judge Grosscup. (Rec., p. 259.) William D. Guthrie argued the motion for an injunction in behalf of the stockholder, D. O. Mills, and James F. Meagher, who was the associate of William D. Guthrie in the Peoples Company's case in this court at that very time, appeared in behalf of the Peoples Gas Light and Coke Company.

While William D. Guthrie and James F. Meagher were thus apparently engaged in a hostile conflict in the stockholders' suit, their relations when litigating the Peoples case as associate counsel before this court were amicable and friendly, for on the very day that the application for a preliminary injunction in behalf of Mills was argued, namely, December 5, 1903, an order was entered by stipulation of all parties, correcting the final decree of July 30, 1902, in the Peoples case, so as to have said decree read that said cause was dismissed "upon the merits as to the alleged contract rights of the complainant, *but without prejudice to any other suit in respect to the question of the power of the City Council under the laws of the State of Illinois.*"

It will be noted that the bill of the Peoples Company had been dismissed on July 30, 1902, for want of jurisdiction, and it was feared that that decree

might bar the prosecution of the stockholders' suit, based upon the want of power of the city council to pass the ordinance of December 13, 1900. This order and stipulation was signed and caused to be entered by Mr. Meagher and Mr. Guthrie for the purpose of paving the way for the stockholders' suit, so as to make it clear that the order of July 30, 1902, did not affect the right of Mr. Mills, the stockholder to bring another suit in behalf of the corporation to test the question of the want of power of the City to pass the ordinance in question.

To the original bill of complaint in the case at bar a demurrer was filed by the City of Chicago, and on January 24, 1904, the Circuit Court handed down an opinion and entered an order overruling the City's demurrer. (*D. O. Mills* v. *City of Chicago and Peoples Gas Light & Coke Company*, 127 Fed., 731.)

After the affirmance by this court of the decree of the Circuit Court, dismissing the bill of the Peoples Company, and on February 1, 1905, the complainant, D. O. Mills, by leave of court, filed an amended bill in this case. (Rec., p. 75.) It was upon this amended bill of complaint that this cause was heard and the final decree entered. Said amended bill of complaint omitted all allegations in reference to the impairment of the contract rights of the Peoples Gas Light and Coke Company by the passage of the ordinance of December 5, 1900, and based the complainant's right to relief solely upon the want of power in the City of Chicago to pass the ordinance in question. Said amended bill also alleged the affirmance by this court of the decree of the Circuit Court dismissing the bill of the Peoples Company

for want of jurisdiction, so far as the contract rights of the Peoples Company were concerned. (Rec., p. 82.) In other respects the amended bill was substantially the same as the original bill.

On the 11th of February, 1905, the City of Chicago filed a demurrer to the bill as amended. (Rec., p. 91.) And on August 1, 1905, the court overruled the demurrer to said amended bill. (Rec., p. 93.) On the 19th of August, 1905, the City of Chicago filed an answer to said amended bill (Rec., p. 94). Said answer alleged (Rec., p. 101) that the suit at bar was brought by the complainant, D. O. Mills, in pursuance of a collusive and unlawful scheme entered into between D. O. Mills and the Peoples Gas Light and Coke Company to wrongfully confer jurisdiction upon said Circuit Court; that ever since the passage of said ordinance of October 15, 1900, the complainant Mills and the defendant Gas Company have made every effort to defeat said ordinance, that there never has been a difference in the interests of, or any conflict between said directors and said complainant with reference to the attempts of all of said parties to defeat the ordinance of October 15, 1900; that the bill of complaint in this cause was filed because both the Peoples Company and the complainant Mills desired to keep this litigation out of the state court and to improperly and collusively confer jurisdiction upon a federal court. Further (Rec., p. 102), that there is no *bona fide* dispute between the complainant and the directors of his Company, but, on the contrary, this is a collusive attempt to make this court take jurisdiction of a question over which it has already decided it has no jurisdiction; that the refusal of the board of

directors to commence a suit, if they have so refused, is not *bona fide,* but is collusive, and that the demand of the complainant and the refusal of the directors is part of the scheme to secure a hearing of this cause of action in the United States courts.

On July 8, 1903, the appearance of the Peoples Gas Light and Coke Company was filed in this cause, but no demurrer, answer, or pleading of any kind was filed by the Peoples Company until November 24, 1905. It is important to note that although the directors of this corporation were charged with the failure to perform their duties in a matter which it is claimed was of the most vital importance, no statement of any kind was ever made, either admitting or denying the truth of complainant's charges until November 24, 1905. During that time no default was taken against the Peoples Company by the complainant Mills, but the complainant, Mills, and the defendant, the Peoples Company, seemed to have treated the entire proceeding as a friendly arrangement and to have regarded the City of Chicago as the only hostile antagonist. This is also established by the testimony of Mr. Meagher, counsel for the Peoples Company, for he says that when Mr. Mills' motion for an injunction was argued before Judge Grosscup on December 5, 1903, he did not say a word (Rec., p. 267), "but was absolutely neutral." (Rec., p. 268.)

On November 1, 1905, an order was entered (Rec., p. 113) providing for the taking of testimony in behalf of all the parties, before Hervey W. Booth, Master in Chancery, under Equity Rule 67, to be certified to the court for use on the trial.

On November 24, 1905, the defendant, the Peoples

Gas Light and Coke Company, filed an answer to complainant's bill (Rec., p. 117); said answer admitted that on the 16th day of December, 1902, the complainant Mills had written a letter to the Board of Directors, as alleged in the bill of complaint, demanding that a suit be instituted by the corporation against the City of Chicago for the purpose of contesting the power of said City to regulate the price of gas, and said answer alleged that at a director's meeting held on the 29th day of January, 1903, the demand of said complainant Mills was under consideration, and that James F. Meagher, counsel for the Peoples Company, then advised said Board of Directors that it would be impolitic and imprudent at that time to commence another suit against the City of Chicago, for the mayor of the City of Chicago, who was a candidate for re-election at an election, to be held in April, 1903, had inflamed the minds of the citizens of Chicago against said Peoples Company, and that the commencement of a new suit would tend to further inflame the public mind, and counsel advised said board that the only safe course to pursue was to defer action until the Supreme Court of the United States should finally decide upon the merits of the case commenced by this defendant in the Circuit Court of the United States, for the Northern District of Illinois, and then pending on appeal in the Supreme Court of the United States; and said answer alleged that the said Board of Directors acted upon the advice of said Meagher and refused, for the reasons above stated, to commence another suit, and so informed the complainant Mills, and that for the same reason the stockholders refused to comply with the demand

of said Mills when said matter was submitted to them. Said answer (Rec., p. 128) prayed that the defendant, Peoples Gas Light and Coke Company, "be hence dismissed with its reasonable costs in this behalf sustained."

On November 17, 1905, the deposition of D. O. Mills was taken before said Special Examiner, and he testified in behalf of the complainant that he went to Mr. Guthrie for information in reference to the Peoples Gas Light and Coke Company in the fall of 1902 (Rec., p. 165); that he, Mills, was under the impression at that time that Mr. Guthrie represented the Company; that the letter of December 16, 1902, was prepared by Mr. Guthrie (Rec., p. 166); and that Mr. Mills did nothing but sign it. He further testified (Rec., p. 168) that some time before the letter of December 16, 1902, was written they had decided to commence a suit. He testified that he did not remember who suggested the idea of commencing a suit, and further, "I remember having a conversation with somebody connected in some way with the Company in reference to the matter, but I could not tell who it was with."

On December 16, 1902, when Mr. Mills claims to have sent a letter to the directors of the Peoples Gas Light and Coke Company, demanding that a suit be instituted in the name of the corporation against the City of Chicago, to contest the validity of the 75 cent gas ordinance, the following persons constituted the directors: A. R. Flower, A. N. Brady, C. K. G. Billings, and G. O. Knapp. The office of the Peoples Company at that time was in the Central Trust Company's Bank on Wall Street. (Rec., p. 177.)

A. R. Flower was a brother of Gov. Flower of New York. Both of the brothers were intimate friends of Mr. Mills, and Mr. Mills met A. R. Flower very frequently. (Rec., p. 178.) Anthony N. Brady was also an intimate friend of complainant Mills and also resided in New York City and Mr. Mills also met him very frequently. (Rec., p. 179.) Yet Mr. Mills testified that he had never talked with either Mr. Knapp or Mr. Flower or any of the directors of the Company in reference to the commencement of this suit. Mr. Mills admits that although his own office was within a few blocks of the office of the Peoples Company he had not attempted to ascertain why the Board of Directors were unwilling to commence the suit demanded by him in the letter of December 16, 1902. It was not until January 29, 1903, that the Peoples Company answered the letter of Mr. Mills of December 16, 1902, urging upon the directors the imperative necessity of beginning another suit against the City of Chicago. When Mr. Mills was questioned if he did not think it strange that a business letter of the importance of the one sent to the Board of Directors had not even been acknowledged a month after it had been mailed, he replied (Rec., p. 183): "I did not think it very strange, I did not care about an answer. I did not regard it especially." The fact that Mr. Mills did not care about an answer and that he did not consult any of the directors who were on such intimate terms with him or go near the Company's office that was then within a stone's throw of him, would seem to indicate that the writing of the letter was a mere formality, mailed pursuant to a prearranged scheme between himself and the directors.

On January 21, 1903, according to his own evidence, he paid Mr. Guthrie, his lawyer, a fee of $5,000. (Rec., p. 186.) This money, according to his evidence was paid a week before he had received any reply from his communication to the Board of Directors and before he knew whether he would be required to begin a suit.

On May 14, 1903, Anthony N. Brady sent a check to the complainant, D. O. Mills, for $5,000, being in full of all moneys that D. O. Mills paid out for the expenses of this suit. (Rec., p. 189.) Mr. Mills said, concerning this $5,000 (Rec., p. 181): "Mr. Brady sent in to the office $5,000 without saying particularly what it was for, but I took it to be to assist in this case." Mr. Mills further testified that when he got this remittance from Mr. Brady, there was no letter or any explanation accompanying this check. (Rec., p. 182.)

Mr. Brady himself testified concerning this $5,000 check (Rec., p. 239) that he had no conversation with Mr. Mills about the matter, until after Mr. Mills' suit was brought; and Mr. Brady further testified (Rec., p. 240) that Mr. Mills suggested to him that $5,000 would be a satisfactory contribution. The minutes of the Board of Directors of the Peoples Company show that at a stockholders' meeting held at 35 Wall Street, New York, on January 29, 1903 (Rec., p. 276-277), Mr. Mills' letter of December 16, 1902, demanding that the Board of Directors institute another suit against the City of Chicago for the purpose of contesting the validity of the Seventy-Five Cent Gas Ordinance, was under consideration, and the minutes of said meeting further show (Rec., p. 279) that Mr. Brady, the Vice-Pres-

ident and Director of the Company, and the same person, who on May 14, 1903, repaid to Mr. Mills all the money that Mr. Mills had paid out for the expenses of the stockholders' suit, offered a resolution which was seconded by Mr. Flower, another friend of Mr. Mills, to the effect "that this Company declines to accede to the request of Mr. D. O. Mills, contained in his communication to the Board of Directors of this Company, dated the 16th day of December, 1902, for the reason that this Board believes that for this Company to institute further legal proceedings to contest the legality of the ordinance adopted by the Common Council of the City of Chicago, October 15, 1900, would excite public prejudice against this Company, which at the present time it is deemed of great importance to avoid."

Mr. Brady further testified (Rec., p. 245) that his ideas in reference to the advisability of commencing further suits against the City of Chicago had not changed on the 14th day of May, 1903, when he gave Mr. Mills a check for $5,000 to be used for the purpose of commencing another suit. Here Mr. Brady's explanation was as follows: "I don't suppose my opinion changed at that time, but Mr. Mills had brought a suit, and wanted somebody to contribute to the expense."

This explanation that Mr. Brady was merely contributing to pay the expenses of the suit that had already been commenced, evidently does not explain for the bill of complaint was not filed by Mr. Mills until June 8, 1903.

Mr. Brady and Mr. Mills both testify that they never discussed the resolution proposed by Mr. Brady, and adopted at the Directors' meeting on

January 29, 1903, by the terms of which the Board of Directors refused to comply with the demands of Mr. Mills, and declined to institute any further suits against the City of Chicago.

Mr. Brady further testified (Rec., p. 248) that although he had never been served with the writ of injunction, yet he obeyed the injunction which compelled him to sell gas to the consumers of the City of Chicago at a dollar per thousand cubic feet, and which enjoined him from reducing the price to seventy-five cents. His willingness to obey this writ, even though he had not been served with a copy of it, may have been occasioned somewhat by the fact that he had contributed the entire expense that Mr. Mills had gone to in obtaining this injunction against himself, and it would be a waste of money as well as base ingratitude for a man to disobey an injunction which he himself had paid the expenses of inducing the court to grant against himself. Notwithstanding the overwhelming evidence of collusion and combination hereinbefore recited between Mr. Mills and his counsel, Mr. Guthrie, and the Peoples Company and its counsel, Mr. Meagher, yet the Peoples Company at all times prior to the final hearing of this cause, maintained an outward pretense of hostility. On November 24, 1905, the Peoples Company filed an answer, which denied that Mr. Mills, the stockholder, was entitled to relief or any part thereof prayed for by him, and which concluded as follows (Rec., p. 128): "And now having fully answered, this defendant prays to be hence dismissed with its costs in this behalf sustained."

Mr. Knapp, the President of the Company, was called to the stand on January 2, 1905, and in re-

sponse to questions propounded to him by Mr. Guthrie, he testified as to the number of consumers the Peoples Company had in the City of Chicago, the number of mains owned by it, and the method by which the Company's business was transacted. (Rec., pp. 198, 199, 200.) Upon cross-examination Mr. Knapp was asked if he was served with any subpoena to come to this hearing (Rec., pp. 214, 215), and replied "No, sir." He then stated that Mr. Meagher told him to come to the hearing; that Mr. Meagher and Mr. Billings and Mr. Knapp met at the Hoffman house on the day before their evidence was given before the Examiner; that Mr. Meagher went over all the evidence of these witnesses, and asked them the same questions that were afterwards propounded to them by Mr. Guthrie on the stand; that on the afternoon of the same day, Mr. Meagher, Mr. Billings and Mr. Knapp all went down to Mr. Guthrie's house, and there agreed on the line of testimony to be introduced on the next day before the Special Examiner. (Rec., p. 216.)

On the 7th day of December, 1905 (Rec., p. 129), counsel for the Peoples Gas Light and Coke Company moved that complainants' time for closing his proofs be extended. The City of Chicago opposed said motion. James F. Meagher, counsel for the Peoples Company, filed a long affidavit giving reasons why Mills, the complainant, should have further time in which to close his proof. Mr. Mills himself testified that his suit was brought for the purpose of conferring jurisdiction on a court of the United States of the case, of which it would not otherwise have cognizance (Rec., p. 164); that he understood at the time that such was the purpose

for which his bill of complaint was filed. After the testimony had been closed in this case, and especially after the president of the Company had himself testified that Mr. Meagher, counsel for the Peoples Company, had gathered up Mr. Mills' witnesses, and brought them to Guthrie's house, and gone over their evidence, it became evident even to counsel for Mr. Mills, that it was folly to keep up any further appearance of hostility between Mr. Mills and the Peoples Company. So on the 30th of January, 1906, a new theory was for the first time adopted by the Peoples Company and an amended answer was filed, the prayer of which was directly contrary to the prayer of the answer of the same Company filed November 24, 1905. Said answer concluded in the following language (Rec., p. 384): "Wherefore this defendant prays that the complainant may have the relief prayed by him in the amended bill of complaint in the above entitled cause." In other words, the Peoples Company prayed that it, and its officers and directors, might be enjoined by the complainant D. O. Mills, from reducing the price of gas to seventy-five cents.

Judge Grosscup, after considering the foregoing evidence, came to the conclusion, and held that there was no evidence of collusion between Mr. Mills and the officers and directors of the Peoples Company, and filed an opinion to that effect (Rec., p. 386), and therefore he entered a decree in conformity with the prayer of the complainant's bill of complaint.

On the 27th day of February, 1906, the Circuit Court entered a final decree in this cause (Rec., p. 388), enjoining the City of Chicago, its officers, agents, servants and employes and every person act-

ing under and by virtue of said ordinance from in any way attempting to enforce said ordinance against the defendants, the Peoples Gas Light and Coke Company, its officers and agents, and likewise enjoining the Peoples Gas Light and Coke Company, its officers and agents, from complying with said ordinance, or any of the provisions thereof.

In view of the evidence contained in the foregoing record, we think that that portion of the injunctional order restraining the Peoples Company from complying with the ordinance might safely have been left out, for, so long as the City of Chicago was enjoined from enforcing the ordinance, we do not believe there would be any likelihood that the officers of the Peoples Company would comply with it.

On the 6th day of March, 1906, the City of Chicago prayed an appeal from said decree (Rec., p. 389) to this court solely on the question of jurisdiction, which appeal was allowed. A certificate to the effect that this appeal was allowed solely on the question of jurisdiction was also filed (Rec., p. 394), and the assignments of errors filed in the court below (Rec., pp. 390-391) relate solely to the error of the Circuit Court in assuming jurisdiction of this cause in view of the facts disclosed by this record.

Specification of Errors.

(Rec., pp. 390, 391, 392.)

1. The court erred in failing and refusing to dismiss the bill of complaint in the above entitled cause for want of jurisdiction, because it appears from the face of the bill of complaint that said cause did not really and substantially involve a dispute or con-

troversy properly within the jurisdiction of said Circuit Court of the United States.

2. The court erred in not dismissing the bill of complaint in the above entitled cause because it appeared from the face of the bill of complaint that the Peoples Gas Light and Coke Company was improperly and collusively joined as a defendant in said cause for the purpose of creating a cause cognizable by the said Circuit Court in a case where jurisdiction would otherwise be wanting in said court.

3. The court erred in failing and refusing to dismiss said bill of complaint for the reason that it appeared from the face of said bill of complaint that the complainant Mills was improperly and collusively joined as a complainant in said cause for the purpose of creating a cause cognizable in the said Circuit Court of the United States.

4. The court erred in not sustaining the demurrer of the defendant, City of Chicago, in the above cause and in not dismissing complainant's bill for the reason that it appeared from the face of said bill of complainant that Darius O. Mills, the complainant, was acting in collusion with and at the request of the defendant, the Peoples Gas Light and Coke Company, and the said defendant, the Peoples Gas Light and Coke Company, was the real complainant in said cause and that therefore said cause should have been dismissed for want of any diversity of citizenship.

5. The court erred in refusing and failing to dismiss said bill of complaint for the reason that it appeared from the face of said bill of complaint

that the Peoples Gas Light and Coke Company and the City of Chicago were both citizens of and residents of the State of Illinois, and that Darius O. Mills, the complainant, was acting collusively as the complainant at the request of and for the benefit of the defendant, the Peoples Gas Light and Coke Company, and that therefore the controversy in this cause was wholly between citizens and residents of the State of Illinois.

6. The court erred in entering the final decree in this cause on the 27th day of February, 1906, and all interlocutory orders and decrees prior thereto, because it appears from the records and proceedings in this cause that the controversy in this cause was wholly and exclusively between the Peoples Gas Light and Coke Company and the City of Chicago, and it further appears that both of said parties were at the time the bill of complaint in this cause was filed and now are citizens and residents of the State of Illinois.

7. The court erred in failing and refusing to dismiss the bill of complaint in this cause on the final hearing, for the reason that the evidence and the record in this cause show that this suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of the said Circuit Court of the United States, sitting as a Federal Court.

8. The court erred in failing and refusing to dismiss the bill of complaint in this cause on the final hearing, because it appeared from the records in said cause that Darius O. Mills was improperly and collusively made and joined as a complainant in this

cause for the purpose of attempting to confer jurisdiction upon a Federal Court in a case where such jurisdiction would otherwise be wanting.

9. The court erred in failing and refusing to dismiss the bill of complaint in this cause on the final hearing, because it appeared from the evidence and record in this cause that the defendant, the Peoples Gas Light and Coke Company, was improperly and collusively joined as a defendant in this cause, for the purpose of attempting to confer jurisdiction upon a Federal Court in a case where such jurisdiction would otherwise be wanting.

10. The court erred in failing and refusing to dismiss the bill of complaint in this cause upon the final hearing, because it appeared from the evidence and records in this cause that Darius O. Mills, the complainant, filed this bill of complaint collusively and improperly at the request of and for the benefit of the Peoples Gas Light and Coke Company and that the said Peoples Gas Light and Coke Company was at all times the real complainant in this cause and that therefore this cause involved a controversy exclusively between the City of Chicago and the said Peoples Gas Light and Coke Company, both residents and citizens of the State of Illinois.

11. The court erred in its decree of February 27, 1906, in finding that the suit is not a collusive one to confer on a court of the United States jurisdiction of a cause, of which it would not otherwise have cognizance.

12. The court erred in its decree of February 27, 1906, in finding that in this cause there is a controversy between citizens of different states, but said

court should have found that the controversy in this cause is wholly and exclusively between citizens of the same state and that there is no evidence in this record that at the time the bill of complaint in this cause was filed, there was any controversy between citizens of different states.

ARGUMENT.

I.

The undisputed evidence in this record shows that this suit was collusively brought by Mr. Mills at the instigation of and for the benefit of the Peoples Gas Light and Coke Company, for the purpose of conferring jurisdiction upon a Federal Court in a case where such jurisdiction was otherwise wanting.

On December 21, 1900, the Peoples Company filed a bill in equity in the Circuit Court of the United States against the City of Chicago for the purpose of restraining said City from enforcing the 75 cent gas ordinance. (Rec., p. 280.) Said bill sought to obtain relief against the enforcement of said ordinance, upon two grounds—

First: It was alleged that the charter of the company, granted by the State of Illinois, and accepted by the company, constituted a contract which gave the company the right to charge One Dollar per thousand cubic feet, and that the ordinance in question impaired the obligation of that contract;

Second: It was alleged that the legislature had never delegated to the City of Chicago the power to regulate the price of gas.

Why was this bill filed in a Federal Court? An examination of the original bill of complaint of the Peoples Company would disclose to any lawyer that the only ground of federal jurisdiction there set out was the alleged impairment of the contract rights of the complainant. If that ground of jurisdiction should not be sustained, then the bill would have to be dismissed. A state court had unquestioned jurisdiction to litigate not only the alleged impairment of the contract rights of the Peoples Company, but had also jurisdiction to determine the alleged lack of power on the part of the City of Chicago to pass the ordinance in question.

The above facts establish two important propositions in this case:

First: That the Peoples Company was seeking to enjoin the enforcement of the ordinance in question, and

Second: That that company was unwilling to litigate that question in a state court, but wanted to raise the question in a Federal Court.

When it is sought to determine whether a suit is collusively brought for the purpose of conferring jurisdiction upon a Federal Court, the question of motive becomes an important one.

Here there was every motive for instituting a collusive suit for the conduct of the Peoples Company, and its officers and directors, prior to the filing of the bill of complaint by Mills, clearly demonstrated that

an unsuccessful effort had already been made by them to confer upon a Federal Court jurisdiction of the litigation in question.

Judge Grosscup, in his opinion, filed in the *Peoples* case on the 15th day of January, 1902, demonstrated very clearly that a Federal Court had no jurisdiction to pass upon the power of the City to pass the ordinance of October 15, 1900. Judge Grosscup, after pointing out that there was nothing in the contention that the contract rights of the Peoples Company were impaired by the ordinance in question, further held, that even if the City of Chicago lacked the power to regulate the price of gas, all litigation concerning that lack of power must be carried on in the state courts.

To quote Judge Grosscup's exact words (Rec., p. 302):

> "If complainant's substantial remedy against the ordinance complained of is lack of power in the City, its relief must be found in the state courts."

If the Peoples Company had been willing to litigate these questions in the state court, it would have been a very simple matter at that time for the Peoples Company to have dismissed its bill of complaint in the United States Court, and to have instituted a new suit in the state court, where the jurisdiction of that court to pass upon both questions raised by the Peoples Company was unquestioned.

The fact that the Peoples Company did not pursue that course, but even after the lack of jurisdiction in a Federal Court had been pointed out, that

company prosecuted an appeal from the judgment of Judge Grosscup to this court, demonstrated that the Peoples Company were unwilling to litigate the above questions in a state court; at least, that the company would not do so, until all efforts to get the matter into the Federal Court had been exhausted.

After the appeal of the Peoples Company to this court from the decree of the Circuit Court had been perfected, it became evident to the officers and directors of the People's Company that the decree of Judge Grosscup would be affirmed by this court, and that in a short time the Peoples Company would be driven to litigate both of the above questions in a state court.

The officers of the Peoples Company then resorted to the familiar scheme of procuring a stockholder to institute a suit in the Federal Court in his own behalf, and to have that stockholder make a sham demand upon the directors and stockholders of his corporation, and to have the directors and stockholders refuse to accede to such demand, pursuant to said prearranged scheme.

In casting about for such a stockholder, it was discovered that D. O. Mills, a resident and citizen of California, but then living in New York city, could be used for such a purpose. Mr. Mills was a friend and business associate of Anthony N. Brady, the vice-president and a director of the Peoples Company. (Rec., p. 178.) He was also an intimate friend and business associate of A. R. Flower, another director and large stockholder in the Peoples Company. (Rec., p. 179.)

Mr. Mills, while perfectly willing to permit his

name to be used as stockholder, for the purpose of bringing suit, was not willing to pay the expenses of the litigation. That expense should be borne by the corporation. The plan outlined was to have Mr. Mills pay the attorney's fee to Mr. Guthrie in the first instance, and then have Mr. Brady, the vice-president and manager of the corporation in New York city, refund the expense to Mr. Mills. Mr. Brady, of course, did not intend to pay out of his own pocket $5,000 for the benefit of all the stockholders of the Peoples Company. When Mr. Brady paid this money he undoubtedly foresaw that after the litigation was over it would be discovered by the officers and directors of the company that Mr. Brady had conferred a benefit upon the corporation by contributing this $5,000, and after the litigation had closed, and the danger of exposing the contents of the corporate books had ceased, it would be an easy matter to have the Board of Directors repay Mr. Brady the $5,000. The above plan was simple, direct and it was thought that it could be carried out without any fear of detection.

Pursuant to the above arrangement, and on the 21st day of January, 1903, D. O. Mills, the complainant, paid to William D. Guthrie, his solicitor, the sum of $5,000, said money to be used for the purpose of commencing a suit in the name of said Mills against the City of Chicago, and the Peoples Company, to restrain the said City and the said company from enforcing the seventy-five cent gas ordinance. (Rec., p. 186; orig., 328.)

On the 14th day of May, 1903, Anthony N. Brady, the vice-president and director of the Peoples Company, refunded to Mr. Mills the $5,000 previously

paid by Mr. Mills to Guthrie. (Rec., p. 186.) A few weeks thereafter, and on June 8, 1903, the complainant Mills filed the original bill of complaint in this cause against the City of Chicago and the Peoples Company.

It will thus appear that before Mr. Mills had even instituted his suit for the purpose of contesting the seventy-five cent gas ordinance, he had already been repaid by the vice-president of the company every dollar that was ever expended by him in this litigation. It was evident that Mr. Mills did not propose to take any chances, but wanted this suit to be financed exclusively by the officers of the Peoples Company.

Of course, we have no means of knowing, except from Mr. Mills' own evidence, whether Mr. Mills paid Mr. Guthrie the $5,000 on January 21, 1903. It is possible that that $5,000 was paid after Brady had paid the money to Mr. Mills; but, assuming the evidence of Mr. Mills to be true, it does not place the conduct of the officers of this company and Mr. Mills in any more favorable light.

Mr. Mills claims to have written a letter on December 16, 1902, addressed to the Peoples Company, requesting the Board of Directors of that company to institute another suit against the City of Chicago for the purpose of contesting the seventy-five cent gas ordinance. A copy of this alleged letter is set forth in the record. (Rec., p. 277.) It was claimed on the trial that the original letter had been lost by the Peoples Company. No attempt was made to explain how a document of such importance could have disappeared from the company's files, and the absence of the letter itself would tend to

show that no such letter was ever mailed or written, but an alleged copy was made up for the purposes of this suit.

Who was Mr. Mills' lawyer in the suit filed on the 8th of June, 1903? William D. Guthrie.

According to complainant's evidence, in August, 1903, and before any injunction had been asked for or granted in the Mills suit, the same Mr. Guthrie was retained to represent the company. Mr. Guthrie and Mr. Meagher both appeared as counsel for the company in this court in the prosecution of the Peoples Company's suit, and yet, while Mr. Meagher and Mr. Guthrie were thus co-operating jointly for the purpose of obtaining relief on the company's bill in this court, Mr. Guthrie was conducting a sham suit in the Circuit Court in the name of Mr. Mills and against the Peoples Company and was seeking to enjoin the Peoples Company in this suit from doing the very things that Mr. Guthrie and Mr. Meagher were both in this court contending the Peoples Company had a right to do and wanted to do.

The above circumstances alone are sufficient within the authorities hereinafter quoted to require the dismissal of this suit, as collusive. Equity Rule 94 provides that whenever a bill is brought by a stockholder in a Federal Court, seeking to obtain relief because the corporation has refused to act, the stockholder must show, among other things, that his suit is instituted in good faith and without collusion with the corporation for the purpose of conferring jurisdiction upon a Federal Court in a case where such jurisdiction is wanting.

Now, under the above rule, the burden was upon

the complainant in this case to show that the bill was filed without collusion and in good faith. The complainant placed upon the stand a number of witnesses in an attempt to prove the above facts, but those witnesses not only failed to show that there was no collusion, but their evidence clearly and conclusively established the fact that the Mills suit was fraudulent and collusive and instituted by Mr. Mills as a mere stool-pigeon for the purpose of protecting the corporate interests and with the co-operation and connivance of the directors and attorneys of the Peoples Company.

Mr. Mills testified (Rec., p. 165) that when he went to Mr. Guthrie in the fall of 1902, his impression was that Mr. Guthrie represented the company. He thinks he signed a letter, but he had nothing to do with the composition of it and knew nothing about it except that it was presented to him by Mr. Guthrie. He further testified (Rec., p. 167):

> "Q. Now, when did you next see him, how long after the next interview? A. I think the next interview would be probably when it was decided to commence my suit.
>
> "Q. Your suit? And when was that? A. That would be some time in 1902."

In other words, Mr. Mills admits that in the latter part of 1902 Mr. Guthrie and himself had decided to commence the Mills suit. In the face of the fact that they had decided to commence a suit at that time, they went through a sham performance of requesting the Board of Directors to take action. It is claimed that the letter of December 16, 1902, was then written and mailed to the company's office at Chicago. Mr. Mills admits that he was

an intimate friend of Mr. Brady and Mr. Flower, the leading members of the Board of Directors, that they resided in New York, that the Gas Company's office in New York city was within a short distance of his own, and yet Mr. Mills says that he never talked with any of the officers or stockholders about the commencement of this suit. Those circumstances alone show that the writing of the letter was a mere pretense. No attempt was made by Mr. Mills to induce any of the officers or directors of this company to act in the way he pretended he wanted them to act. It was not until January 29, 1903, that the Board of Directors passed a resolution refusing to comply with Mr. Mills' request that a suit be instituted by the company. Yet on January 21, 1903, and before the directors had acted and before Mr. Mills had received any information from any source on the question as to whether or not the directors would act, Mr. Mills testified (Rec., 186) that he retained Mr. Guthrie on that day and paid him a fee of $5,000. An attempt is made to explain away this most damaging piece of evidence by saying that Mr. Meagher and Mr. Guthrie had consultations during this period and that Mr. Guthrie had ascertained that Mr. Meagher differed with him about the commencement of this suit. The conclusive answer to that proposition is that Mr. Mills testified (Rec., 184) that he had not talked to any of the directors or officers of the company and that Mr. Guthrie, his own lawyer, had not informed him why Mr. Mills' letter of December 16, 1902, was not answered. The fact that Mr. Mills was the mere stool-pigeon for the corporation and that no answer was expected is made clear by his own testimony.

He says (Rec., 183), in answer to the question as to whether he did not think it strange that no answer was received within a month to so important a communication: *"I did not think it very strange. I did not care about an answer. I did not regard it especially."* The letter upon its face states that it was a matter of urgent necessity. Mr. Mills admits that when he wrote it he did not care about an answer. And why? Because, as he had previously testified, he had already decided to commence a suit and had already retained Mr. Guthrie as his counsel.

On January 29, 1903, this letter of Mr. Mills of December 16, 1902, which purported upon its face to be a matter of great importance, but which Mr. Mills frankly admitted he did not expect to be answered, was presented to the Board of Directors. Mr. Mills' proposition that the corporation begin another suit to contest the validity of the 75 cent gas ordinance was voted down.

> "The matter was discussed at length and the following resolution offered by Mr. Brady, seconded by Mr. Flower, on being put by the chair was carried unanimously (Rec., p. 279):
>
> "Resolved, that this company declines to accede to the request of Mr. D. O. Mills, contained in his communication to the Board of Directors of this company, dated the 16th day of December, 1902, for the reason that this Board believes that for this company to institute further legal proceedings to contest the legality of the ordinance adopted by the common council of the City of Chicago October 15, 1900, 'would excite public prejudice against this company, which at the present time it is deemed of great importance to avoid.'"

The resolution that no such suit be commenced was proposed by Anthony N. Brady, the vice-president of the company, and the intimate friend of Mr. Mills, and was second by A. R. Flower, a New York stock broker, a brother of ex-Governor Flower, and also an intimate friend of Mr. Mills.

Mr. Mills further testified that on May 14, 1903, he received a check from Mr. Brady, the vice-president of the company, for $5,000. This check, Mr. Mills testified, came to his office without any letter or explanation. (Rec., p. 182.)

> "Q. And was there any letter inside of it at all? A. No, sir.
>
> "Q. Nothing of any kind which would be of explanation? A. No, sir.
>
> "Q. Just this check for $5,000? A. Yes, sir."

And further (Rec., p. 186):

> "Q. When did you receive the $5,000 check from Mr. Brady? A. May 14, 1903, check, A. N. Brady, $5,000.
>
> "Q. And when did you pay Mr. Guthrie the $5,000 fee? A. The 21st of January, 1903.
>
> "Q. Did you have any talk with Mr. Brady about this suit before you received this check of $5,000 from him? A. I don't know that I did."

Bearing in mind now that Mr. Mills' suit was not commenced until June 8, 1903, we have here the following startling condition of affairs: On January 29, 1903, Mr. Brady, the vice-president of the company, offers a resolution denying Mr. Mills' request to begin any further action against the City of Chicago. Mr. Mills, we are told, decides to go ahead and fight the directors and officers of the company.

On May 14, 1903, nearly a month before Mr. Mills'

suit is filed against the directors and officers of the company, Mr. Brady, the vice-president of the company and the man who offered the resolution at the directors' meeting against the commencement of the proposed suit, pays Mr. Mills, the man who is about to begin a suit against him, $5,000, being all the money that Mr. Mills has ever paid out in the litigation.

Mr. Mills' testimony to that effect is as follows (Rec., p. 189):

> "Q. So that, have you paid out any money at all in this case except the $5,000 that you paid by check to Mr. Guthrie? A. I think not.
> "Q. And that you got back from Mr. Brady? A. Well, I don't think I got it back from him.
> "Q. Well, you got $5,000 from him? A. Yes, sir."

Mr. Mills was indeed a fortunate individual. He had paid his counsel $5,000 for the purpose of beginning a suit against the Peoples Company and before the suit was actually filed the vice-president of the company reimbursed him for the entire outlay.

The generosity of Mr. Brady is unparalleled in the history of legal literature. The history of lawsuits usually deals in acts of selfishness, greed and a studied effort on the part of each person to better his own pecuniary condition. Mr. Brady, however, according to this record, is not endowed with the ordinary instincts of selfishness. The spirit of altruism displayed by Mr. Brady goes far beyond the dream of the most optimistic social philosopher.

On June 8, 1903, Mr. Mills filed a bill (Rec., p. 83) praying, among other things, that an injunction is-

sue "against the defendant, the Peoples Gas Light and Coke Company, restraining and enjoining it, its officers, servants, agents and employes from complying with the aforesaid ordinance of October 15, 1900, or any of the provisions thereof and from submitting thereto and from reducing the price of gas to 75 cents per thousand cubic feet under compulsion thereof."

As Mr. Brady was the vice-president and one of the directors of this company, under familiar rules of law, he came within the terms of the restraining order. We have, then, the anomalous state of affairs that the vice-president of a company pays all the expenses of a suit that is brought against him and his company, enjoining him and his company from complying with the law. We do not believe that in the entire literature of the law can be found another case where a man has paid to his adversary before the suit is commenced the entire expense of obtaining an injunction against himself. This amazing state of affairs is brought about through the attempt of the officers of this company to carry on a dishonest and collusive contest for the purpose of conferring upon a Federal Court jurisdiction in a case where such jurisdiction is wanting.

Mr. Brady testified (Rec., p. 247) that when he and Mr. Guthrie discussed this suit, they "laughed about it." It surely has its humorous side, but it is one of those cases where the iniquity of the transaction so far transcends the humor that what might otherwise be regarded as a comedy becomes a tragedy. The three hundred and fifty thousand consumers of gas who are deprived of their rights by this collusive and dishonest combination do not see as much humor in

this situation as the venerable vice-president of the corporation and his astute counsel.

It is well to bear in mind that although the bill of complaint in this cause was filed on the 8th day of June, 1903, the application for a preliminary injunction was not argued until the 5th day of December, 1903. Before the application for a preliminary injunction had been considered by the court, and in July or August, 1903, Mr. Meagher, counsel for the Peoples Company, went to New York and retained Mr. Guthrie, the counsel for the stockholder who was making such serious charges against the company, as the counsel for the company. (Rec., p. 258.) Mr. Guthrie had already informed Mr. Meagher and his own client, Mr. Mills, according to the evidence of Mr. Meagher, that the Peoples Company could not possibly win the appeal of the company's case in this court.

We have, then, this astonishing state of affairs: That Mr. Guthrie, who has informed the Peoples Company's counsel that that company cannot win, is retained to argue the very case that Mr. Guthrie has no confidence in, and Mr. Mills, who is fighting the directors of this company for their flagrant breach of duty, sees no impropriety in those very directors engaging his own counsel to argue a case which that counsel thinks is unfounded. Mr. Guthrie, with his high sense of professional honor, does not see any impropriety in accepting a retainer for the purpose of arguing a case that he thinks is unfounded.

On November 24, 1905, the Peoples Company filed an answer and the prayer of that answer was as follows (Rec., p. 128):

"And now having fully answered, this defendant prays to be hence dismissed with its reasonable costs in this behalf sustained."

In other words, the Peoples Company prayed that the bill might be dismissed as to it and that the complainant, Mills, should be ordered by the decree of this court to pay to the Peoples Company its costs. That answer was filed for the purpose of imposing upon the court and counsel for the City and inducing them to believe that there was a real controversy between Mr. Mills and the Peoples Company. The last examination of the officers of the company in New York shattered all hope of counsel being able to further maintain this sham battle.

Mr. G. O. Knapp, the president of the Peoples Company, was called to the stand in behalf of Mr. Mills and testified on direct examination as to the number of consumers the Peoples Company had in the City of Chicago, the number of miles of mains and the method by which the company's business was conducted. Upon cross examination Mr. Knapp was asked if he was served with any subpoena to come to this hearing, and he replied, "No, sir." He then stated (Rec., pp. 213, 215) that Mr. Meagher told him to come to this hearing, and testified as follows:

"Q. And when did he next speak to you (referring to Mr. Meagher)? A. I think he told me yesterday morning that he wished me to come to the hearing today.

"Q. Where did you see him that time? A. At the Hoffman House."

And further (Rec., p. 214):

"Q. Did Mr. Meagher say anything about what he expected to prove by you here today? A. He talked the case over generally. * * *

"Q. Did he ask you as to how many mains the Peoples Company had in the streets of the City of Chicago? How many miles? A. I think he did.

"Q. What did you tell him? A. I gave him the information."

Then follows a detailed cross examination of Mr. Knapp, in which he admits that Mr. Meagher asked Mr. Knapp at the Hoffman House, the day before, the same questions that Mr. Guthrie put to Mr. Knapp while on the stand. Mr. Knapp further testified that Billings, another director of the company, was also present and talked this matter over and that Mr. Meagher took Mr. Billings and Mr. Knapp both down to Mr. Guthrie's house that same day and there again the same ground was gone over.

The exact evidence on this subject being as follows (Rec., p. 216):

"Q. Have you ever talked with Mr. Guthrie about this case? A. Yes.

"Q. When? A. Yesterday afternoon.

"Q. Where did you meet Mr. Guthrie? A. At his house.

"Q. What time was that? A. About half-past four, I think.

"Q. Who were present at that talk? A. Mr. Meagher, Mr. Billings and myself.

"Q. Was Mr. Brady there? A. No, sir.

"Q. Did you talk anything about this case to Mr. Guthrie at the time? A. Yes, sir.

"Q. Did you talk over any of the things that you and Mr. Meagher had discussed at the Hoffman House at Mr. Guthrie's house? A. The same questions that you spoke of."

This hearing was had on the 2nd of January, 1906. We have, then, this remarakble state of affairs, that while the attorney for the Peoples Company has filed an answer in which he claimed that he wanted the bill dismissed, that very same attorney, Mr. Meagher, was gathering up the witnesses for the complainant Mills and bringing them to Mr. Guthrie's house and talking over the very matters that those witnesses were questioned about the next day while on the witness stand. Was such a spectacle ever before presented in a court of justice? The defendant, who claims to be hostile to the plaintiff, goes out on New Year's Day and gathers together all the plaintiff's witnesses and brings them to the house where the attorney for the plaintiff resides. Not content with that, the attorney for the defendant goes over the entire testimony of the plaintiff's witnesses so as to see that they are able to prove the allegations of the plaintiff's complaint and yet counsel has the temerity to assert that there is no evidence of collusion contained in this record.

Mr. Knapp, the president of the company, further testified as follows (Rec., p. 218):

> "Q. But as president of this company, are you in favor of seeing Mills win this suit or are you in favor of seeing Mills lose this suit in which we are now taking evidence? A. I don't know the legal points involved, and I would have to ask my counsel all the legal points before giving an opinion on that."

The president of a corporation here testifies under oath that in a suit that has attracted so much notoriety as the case at bar and in a case where he had been in conference all of the previous day with

Mr. Meagher, the counsel of the company, he did not know whether he wanted to see the company win or lose until he had consulted his counsel.

Mr. Brady, however, took the stand and testified that he was in favor of seeing Mr. Mills win his suit. Mr. Meagher testified (Rec., p. 265):

> "I have never lifted a finger to assist Mr. Mills in any way."

Yet he further testified (Rec., pp. 265, 266): That he had appeared two or three times before Mayor Dunne and tried to get the mayor to agree to an extension of Mr. Mills' time to close his proofs. Mr. Meagher also admitted that four applications were made by him for an extension of Mr. Mills' time to close his proofs and that he had complained to Mayor Dunne that the City was treating Mills unfairly in attempting to get a $15,000,000 injunction bond in this case. It may be that Mr. Meagher desires that his evidence should be literally construed about not lifting a finger, but in view of what is contained in this record, it is plain beyond controversy that Mr. Meagher has been the most active and aggressive counsel for Mr. Mills.

After the testimony had been closed in this case, and after the president of the company himself had testified as to how Mr. Meagher had gathered up Mr. Mills' witness and brought them to Mr. Guthrie's house, it became evident even to counsel for Mr. Mills that it was folly to argue to any fair-minded person that there was any real controversy between the Peoples Company and Mr. Mills, so on the 30th day of January, 1906, the Peoples Com-

pany filed an amended answer, in which was contained the following startling prayer (Rec., p. 128):

> *"Wherefore this defendant prays that the complainant may have the relief prayed by him in the amended bill of complaint in the above entitled cause."*

On November 24, 1905, the Peoples Company prayed that the suit against it might be dismissed, that the costs should be taxed against Mr. Mills. Less than five weeks thereafter the same company files an amended answer in which the prayer is directly contrary to the prayer contained in the former answer. The last answer filed is also remarkable in another respect. *It is the first instance on record, we believe, where a defendant corporation has filed an answer, praying that the complainant may be awarded a perpetual injunction against it.*

But counsel tell us that there is no evidence that the $5,000 check paid by the vice-president of the company was the company's money. It is argued that before collusion can be proved in this case, it is necessary to show that the check was drawn by the treasurer of the company and that a resolution of the Board of Directors was passed, authorizing the treasurer to pay the money to Mr. Mills. Such an argument is unworthy of any answer.

If the above proposition is sound, then collusion could never be proved in any case. Men who engage in collusive litigation never sign, seal, execute and deliver the evidences of their own fraudulent conduct. There is, however, a most significant circumstance which shows that Brady himself knew that this $5,000 came from the company. After Mills had been subpoenaed as a witness in New

York city, but before he had testified, Mr. Brady went to Mr. Mills' office and what took place there was described by Mr. Mills as follows (Rec., p. 190):

> "Q. But when did you meet him before this hearing? (Referring to Mr. Brady.) A. I saw him, it must be since I had notice of this meeting."
>
> * * * * * * * *
>
> "Q. What did he say? A. Well, I don't know that he said directly that he sent his contribution to this suit, but he said that it was his own money and he did not give it—it was his own money that he sent in.
>
> "Q. It was his own money? A. Yes.
>
> "Q. He did not get it from where? A. It did not come from the company."

It is to be remembered that at the time Mr. Brady found it necessary to go over to Mr. Mills' office and caution Mr. Mills against the notion that the $5,000 check given by Mr. Brady was not the company's money, that at that time no evidence had been given about the $5,000 check and no claim had ever been made by anybody that the $5,000 check was the company's money. Mr. Brady's mission to Mr. Mills at that time shows two things: First, that Mr. Brady knew that the money came from the company; and, second, that he feared that unless Mr. Mills was coached on this matter Mr. Mills might happen to tell the truth about it.

If the jurisdiction of this court in behalf of Mr. Mills can be sustained, then there is no case *where a stockholder cannot go into the Federal Court if he is willing to make an appropriate allegation.*

The fact that the vice-president of the company pays the expenses of the litigation, we are told, is

no obstacle; the fact that the alleged dissenting stockholder employs the same counsel as the company and at the same time, we are told, is no evidence of collusion; the fact that the attorney for the company gathers the evidence for the complainant, we are told, is no evidence of collusion; and finally, we are told, that the fact that the company itself prays that the dissenting stockholder may have an injunction against the company should be disregarded in determining whether or not this suit is collusive.

If the right of the stockholder to maintain this suit shall be sustained, the law on the question of when a stockholder may intervene in a Federal Court and bring a suit to redress corporate grievances, will be very much simplified. It will amount to this: Whenever a stockholder is willing to make under oath the appropriate allegations, his bill will be maintained, regardless of all the circumstances of collusion, fraud and combination, that cluster about the conduct of the litigation.

We respectfully submit that no such law ever has been nor ever will be laid down by our Federal Courts. It would be a reproach to a court that bears the name of equity if men who have been guilty of deceiving and imposing upon the court in the manner described in this record should be permitted to obtain their relief in the very same tribunal.

But counsel tell us that we should have direct and positive evidence of collusion. A contention of that kind is certainly an innovation in a legal argument. In the numerous cases hereinafter quoted in our brief, we shall show that collusion was readily

inferred by courts from facts and circumstances alleged in the bill of complaint, even where the parties in that very bill denied its existence. But if direct and positive evidence of collusion is essential, this record meets not only the requirements of this court, but it comes up even to the more rigorous rule announced by complainant's counsel, namely, that the evidence should be direct.

Mr. Mills, when interrogated by his own counsel, testified as follows (Rec., 164):

> "Q. Was the suit brought to confer on the Court of the United States jurisdiction of a case which it would not otherwise have cognizance of? A. I so understood it.
>
> "Q. Did you hear the question, Mr. Mills? A. I so understood it, yes, sir.
>
> "Q. You understood what? A. The question as put, if you will read it.
>
> (Question read.)
>
> "A. Yes, sir."

It will be noted that Mr. Mills, the complainant himself, in the above testimony, plainly and unequivocally says in answer to the question of his own counsel that he understood that this suit was brought to confer on the court of the United States jurisdiction of a case which it would not otherwise have cognizance of. His counsel then adroitly suggested to the witness: "Did you hear the question, Mr. Mills?" intimating to the witness that the answer was unsatisfactory and giving him an opportunity to change the answer to conform with counsel's theory. The question was again read and the witness made the same answer. Counsel tells us that Mr. Mills did not understand this question. Mr.

Mills says that he did. Counsel here ask us to assume that Mr. Mills did not understand this question when he says he did, and counsel ask us to assume that he would have answered it differently from what he did had he understood the question.

The court says in its opinion that this testimony of Mr. Mills (Rec., 386) "impresses one, reading it, rather as a misunderstanding of the questions put, than as an admission of any agreement between Mills and the company."

The question was first put to Mr. Mills, and he answered it directly. He was then asked if he understood the question, and he replied that he did. It was again read to him, and he answered it in the same way.

The reading of Mr. Mills' testimony does not so much impress one that Mr. Mills "misunderstood" *the question*, as that he "misunderstood" *the effect the answer to the question would have upon his lawsuit*. The question was plain and simple; it was read to the witness twice, and he answered it both times in the same way, and his own counsel did not dare to press the subject any further, for fear that each succeeding answer would confirm the accuracy of the prior one. We are not familiar with any rule of either law or logic, which justifies a court in saying that a witness meant, not what he plainly testified to, but the diametrically opposite.

At the time when the bringing of Mr. Mills' suit was under discussion, it was evidently fully explained to Mr. Mills that the suit of the Peoples Company had been dismissed, for want of jurisdiction, because that company was a citizen and a resident of Illinois, and Mr. Mills was undoubtedly told

that he, being a citizen of California, could bring a suit, of which the United States Court would have jurisdiction. Mr. Mills, when he took the witness stand, had in mind matters which had been related to him, namely, that his suit was brought for the purpose of conferring on a court of the United States jurisdiction in a case where jurisdiction was otherwise wanting. Mr. Mills did not know there was anything wrong or improper about the commencement of such a suit, and when he truthfully answered the above questions propounded to him by his own counsel, he did not know that the admissions made by him were going to defeat his lawsuit. Had he so appreciated the force of his answer, he undoubtedly would have answered the question, not according to the truth, but according to the answers which his own counsel desired, but which Mr. Mills did not then understand. In other words, Mr. Mills' answer does not result from any misunderstanding on his part of *the question*, but rather a misunderstanding on the part of Mr. Mills of *the kind of an answer that Mills' counsel wanted him to give.*

We are told in this case that we should disregard the numerous facts and circumstances showing the collusive and fraudulent character of this suit; we are told that we should disregard the testimony of the complainant himself; we are told that when the complainant says that this case was brought for the purpose of conferring jurisdiction of a case of which the Federal Court would not otherwise have jurisdiction, that Mr. Mills did not mean what he said, but that he meant directly the opposite. The absurdity of such a contention does not merit any

serious consideration. This suit was evidently instituted for the purpose of conferring jurisdiction upon the Federal Court in a case where jurisdiction would otherwise be wanting, and Mr. Mills' testimony to that effect is corroborated by every instinct of human nature—by every witness—and by every fact and circumstance in the record.

Judge Grosscup, in his opinion (Rec., p. 386), said, concerning the proof required in order to make out a case of collusion:

> "But circumstantial evidence, to be conclusive from the mere fact of cumulation, must lead the judgment to this conclusion that, all the circumstances considered, there is no explanation for their existence except upon the existence of the fact sought to be proven. That condition of things does not exist here."

The above opinion of Judge Grosscup was erroneous in two particulars. In the first place Judge Grosscup cast the burden of proof upon the defendant to establish the existence of collusion. Equity Rule 94 of this court casts the burden of proof on the complainant, for that rule requires that the complainant must allege and prove that the stockholder's suit was instituted in good faith and without collusion with the corporate officers.

The rule laid down by Judge Grosscup was erroneous in another particular. It required that the facts in the case should be inconsistent with any other hypothesis than that of collusion. This requires proof beyond all *possibility* of doubt.

The rule in civil cases is that a fact is established when the mind of the court leads to the natural and reasonable inference of the existence of that fact.

even though that fact might be explained on some other hypothesis. As Herbert Spencer said: "Anything which does not involve an absolute contradiction in terms is possible." Even should we concede that it is *possible* that there was no collusion in this case it is far beyond the realm of any reasonable human *probability*.

The fact that in a case where the question of conferring jurisdiction upon a Federal court by getting up a collusive controversy is involved, the burden of proof is upon the complainant, is established by the well considered case of *Lehigh Mining & Manufacturing Co.* v. *Kelly*, 160 U. S., 337. It was insisted in that case that there was no formal agreement between the corporation then before the court and the Virginia corporation, that the title should be reconveyed to the Virginia corporation, and therefore the court could not infer the existence of such an agreement. This court denied the efficacy of that contention and said, page 337:

> "It is also true that there was no formal agreement upon the part of that corporation 'as an artificial being, invisible, intangible, and existing only in contemplation of law,' that the title should ever be reconveyed to the Virginia corporation. But when the inquiry involves the jurisdiction of a Federal Court—the presumption in every stage of a cause being that it is without the jurisdiction of a court of the United States, unless the contrary appears from the record (*Grace* v. *American Cent. Ins. Co.*, 109 U. S., 278, 283 [27: 932, 934]; *Bors* v. *Preston*, 111 U. S., 252, 255 [28: 419, 420])—we cannot shut our eyes to the fact that there exists what should be deemed an equivalent to such an agreement, namely, *the right and power* of those who are stockholders of each corporation to *compel* the

one holding the legal title to convey, *without a valuable consideration*, such title to the other corporation. In other words, although the Virginia corporation, as such, holds no stock in the Pennsylvania corporation, the latter corporation holds the legal title, subject *at any time* to be divested of it by the action of the stockholders of the grantor corporation who are also its stockholders."

II.

There is no force in the contention that there was a real controversy between Mr. Mills and the directors of the Peoples Company when the bill in the cause was filed.

Counsel for complainant Mills contended that there was a real and substantial controversy between Mr. Mills, the stockholder, and the Board of Directors and officers of the Peoples Company at the time the bill of complaint was filed and that at that time the Peoples Company and its officers were endeavoring to defeat Mr. Mills' suit, but that after the decree of the Circuit Court dismissing the bill of complaint of the Peoples case was affirmed by this court and after the quo warranto proceedings instituted by the State's Attorney of Cook County, Illinois, had been affirmed by the Supreme Court of Illinois, the officers and directors of the Peoples Company experienced a change of heart and then became in favor of Mr. Mills' suit, because they then discovered that the Company would obtain no relief from the Peoples Company's suit in this court.

Concerning this, Judge Grosscup said (Rec., 386):

"Since the Mills suit was brought the Company suit had been heard and affirmed by the

> Supreme Court of the United States. The Company is without hope now of any relief through that suit; but that does not prove that at the time the Mills suit was brought the Company did not reasonably believe that the decree of the Circuit Court of the United States, dismissing the bill, would be reversed."

The belief of a corporation—if such a term can be applied to it, can only be the belief of its officers and attorneys. Evidently Mr. Brady, the vice president and director of the Peoples Company, did not believe on the 14th day of May, 1903, that the decree of the Circuit Court, dismissing the Peoples Company's bill, would be reversed by this court, else, why did he pay $5,000 to Mr. Mills for the purpose of commencing a suit, to contest the validity of the same ordinance?

Mr. William D. Guthrie was retained as counsel for the Peoples Company in August, 1903. On the 5th of December, 1903, Mr. Guthrie did not believe, as the counsel for the Peoples Company, that the decree of the Circuit Court, dismissing its bill, would be reversed, otherwise, why did he press the application of the complainant Mills for an injunction in the stockholder suit?

On the 30th day of January, 1906, after the taking of testimony in this cause had been closed, the above theory was invented by counsel for Mills and the Peoples Company, and at that time an answer was filed (Rec., p. 370), which, for the first time, set forth the above theory in the following language (Rec., p. 383):

> "This defendant further answering shows unto the court that subsequent to the filing of the original bill of complaint in the above en-

titled cause, the decree of the Circuit Court of the United States for the Northern District of Illinois, Northern Division, in the aforesaid suit brought by this defendant against the City of Chicago, was affirmed on the appeal of this defendant, by the Supreme Court of the United States, as hereinbefore set forth, and that the judgment of said Circuit Court of Cook County, Illinois, in the quo warranto proceedings aforesaid was affirmed on the appeal of the People of the State of Illinois, by the Supreme Court of Illinois, as hereinbefore set forth, and that by reason of the final disposition of the aforesaid appeal to the Supreme Court of the United States and of the aforesaid appeal to the Supreme Court of Illinois, both of which said appeals were pending at the date of the filing of the original bill of complaint herein, the grounds for the original refusal of this defendant to institute further legal proceedings against the City of Chicago for the purpose of restraining the enforcement of said ordinance of October 15, 1900, have ceased to exist and that it has, therefore, become and now is to the interest and advantage of this defendant, that the complainant in the above entitled cause shall prevail in the said cause, and that this defendant is advised by counsel that it would not be justified in instituting additional or independent litigation presenting the same question as that involved in the above entitled cause, during the pendency of said cause.

"Wherefore, this defendant prays that the complainant may have the relief prayed by him in the amended bill of complaint in the above entitled cause."

That the above theory was an afterthought and was never intended to be pressed while the hearing was going on is clearly made out by an examination of the prior answer in this case. It will be noted

that the foregoing answer states that by reason of the affirmance by this court of the decree of the Circuit Court in the Peoples Company's case and the affirmance by the Supreme Court of Illinois of the judgment of the Circuit Court of Cook County in the quo warranto case "the grounds for the original refusal of this defendant to institute further legal proceedings against the City of Chicago for the purpose of restraining the enforcement of said ordinance of October 15, 1900, have ceased to exist and that it has therefore become and now is to the interest and advantage of this defendant, that the complainant in the above entitled cause shall prevail in said cause. * * * Wherefore this defendant prays that complainant may have the relief prayed by him in the amended bill of complaint in the above entitled cause."

On the 27th of October, 1903, only a few months after Mills' bill of complaint was filed, the Supreme Court of Illinois entered a judgment, affirming the judgment of the Circuit Court of Cook County, Illinois, dismissing the quo warranto proceedings against the Peoples Company. On the 4th of April, 1904, this court entered a judgment affirming the decree of the Circuit Court in dismissing the bill of complaint of the Peoples Company.

On November 24, 1905, after this cause had been referred to a special examiner for the taking of testimony, Mr. Meagher, counsel for the Peoples Company, for the first time, filed an answer to Mills' bill of complaint in this cause.

The fact that the Supreme Court of Illinois had affirmed the judgment of the Circuit Court of Cook County of Illinois, dismissing the quo warranto pro-

ceedings brought against the Peoples Company, and the fact that this court had affirmed the decree of the Circuit Court, dismissing the bill of complaint of the Peoples Company,—both of the above facts were then well known to counsel for the Peoples Company. If the Peoples Company were antagonistic to Mr. Mills at the time his bill of complaint was filed, but by reason of the above decisions, they were in favor of the Mills suit, why did not the answer of the Peoples Company, filed November 24, 1905, disclose that fact? If the officers of the Peoples Company were then in favor of seeing Mr. Mills sustain his suit, why did not the answer filed on November 24, 1905, pray as did the amended answer of January 30, 1906, that "the complainant may have the relief prayed by him in the amended bill of complaint in the above entitled cause"? Why did counsel for the Peoples Company in their answer filed November 24, 1905, conclude by saying (Rec., p. 128), "And now having fully answered this defendant prays to be hence dismissed with its reasonable costs in this behalf sustained"? Counsel who drew that answer very well knew that if Mills' bill of complaint as to the Peoples Company was dismissed, the injunction which had previously been granted would be vacated and set aside and Mills' bill against the City of Chicago would also have to be dismissed at the cost of Mr. Mills.

The above facts clearly and conclusively demonstrate that when the answer of October 24, 1905, was filed the Peoples Company and its officers and attorneys wanted to deceive and mislead the court and counsel for the City of Chicago by maintaining a pretended opposition to the bill of complaint of

Mr. Mills, in the hope that by so doing counsel for the Peoples Company could induce the court to believe that there was then a real controversy between the directors of the Peoples Company and Mr. Mills.

Why did Mr. Meagher file an answer on November 24, 1905, in behalf of the Peoples Company, praying that the bill of complaint of Mills, the stockholder, against the Peoples Company, should be dismissed, and why did Mr. Meagher, on the 30th day of January, 1906, less than two months thereafter, file an answer which prayed for the diametrically opposite relief, namely that Mills, the stockholder, should obtain an injunction in accordance with the prayer of his bill of complaint?

We have demonstrated that the claim made by Mills' counsel in the court below and sustained by Judge Grosscup, namely, that Mr. Meagher's change of heart, as evidenced by his answer of January 30, 1906, was brought about by the changed conditions resulting from the decision of this court in the Peoples Company's case and that of the Supreme Court of Illinois in the quo warranto case, does not explain, for both of the above decisions had been rendered more than a year prior to the filing of the answer of November 24, 1905, in which the Peoples Company still pretended to insist that that Company was fighting Mr. Mills' suit and wanted that suit dismissed at Mills' cost.

When Mr. Billings, one of the directors of the Company, was being cross examined in the hearing before the Examiner, on January 2, 1906, the following occurred (Rec., p. 235):

"Q. Have you any interest in the outcome of

this case, so far as any desire that one party should win or lose? A. My wish is now that the case should be won, to decide the price question.

"Q. You mean that Mr. Mills should win? A. Yes, sir."

It became evident to counsel for Mr. Mills that after it had been brought out on the hearing of this cause that Mr. Meagher, the attorney for the Peoples Company, had gathered up Mr. Mills' witnesses and canvassed their testimony, and taken them to Mr. Guthrie's house, so as to enable Mr. Mills to win his suit, and after Mr. Billings, one of the directors and largest stockholders of the Company, had testified before the Examiner that he desired Mr. Mills to win, it was useless to further keep up the sham battle which had characterized their conduct prior thereto.

On January 30, 1906, counsel for Mr. Mills and the Peoples Company appreciated that some explanation would have to be made as to why the officers and directors of the Peoples Company had assisted Mr. Guthrie, the counsel for the stockholder, in gathering Mr. Mills' witnesses and proving Mr. Mills' case. The amended answer of January 30, 1906, was intended to pave the way for the new theory of Mr. Mills' counsel, invented for the purpose of attempting to explain away the confessedly incriminating evidence of complainant's own witnesses.

The fact that during the hearing of this cause on January 2, 1906, counsel for the Peoples Company was still attempting to carry on the sham law suit against Mr. Mills and to impose upon and deceive

the court in reference to the fact that there was no controversy between them is evidenced by the testimony of Mr. Knapp, the president of the Company. When he was questioned on January 2, 1906, as to whether he was in favor of seeing Mr. Mills win or lose the case then on trial, he answered: "I don't know the legal points involved. I would have to ask my counsel all the legal points before giving an opinion on that."

It is to be remembered that Mr. Knapp is a bright intelligent business man, that he and Mr. Billings had been in conference with Mr. Meagher, counsel for the Company, all of the preceding day, and that they had met and talked this matter over with Mr. Guthrie, counsel for Mr. Mills, in the afternoon of the day before.

We all know that the moment a corporation is involved in a law suit the manager makes up his mind whether he wants his Company to win or lose. It is taxing human credulity too much to ask us to believe that after an all-day conference with Mr. Meagher and Mr. Guthrie, Mr. Knapp came away without knowing whether he wanted Mr. Mills to win or lose.

It is clear beyond controversy that Mr. Knapp knew when he was testifying that Mr. Meagher wanted to see Mr. Mills win the suit and that Mr. Meagher was then and had all the time been giving Mr. Mills all the assistance in his power. Why did Mr. Knapp conceal from the court his own desires in this matter? The explanation is very apparent. Mr. Knapp knew that Mr. Mills was pretending to fight the directors of the Peoples Company, and he feared that should he answer this question truthfully, it

might establish the collusive character of this law suit.

The same studied effort to conceal from the court the real part that the officers of the Peoples Company had taken in assisting Mr. Mills is illustrated by Mr. Meagher's testimony. Mr. Meagher was present in the court room when Mr. Billings testified that he would like to see Mr. Mills win his case, so Mr. Meagher testified the same way (Rec., p. 264), but Mr. Meagher denied emphatically that he had ever assisted Mr. Mills in any way. The following is his testimony on that subject (Rec., p. 265):

> "Q. You have assisted Mr. Mills in every way you could to win his suit, have you not? A. No, sir, I have never lifted a finger to assist Mr. Mills in any way.
>
> "Q. Well, as a lawyer for the Company, do you mean to say that you have not tried to help out that side which you think ought to win? A. As lawyer for the Company I mean to say that I have done my duty as I have seen it.
>
> "Q. Well, don't you conceive it to be your duty to assist Mr. Mills to win, if you think he ought to win? A. No, I have done nothing to assist Mr. Mills in any way, shape or manner."

Mr. Meagher had to admit, however, on further cross examination (Rec., p. 265), that he went two or three times to Mayor Dunne and asked the mayor to grant to Mr. Mills an extension of time for Mr. Mills to close his proofs. Mr. Meagher further admitted (Rec., p. 266) that he told Mayor Dunne that it was unfair that the City of Chicago should ask a bond of $15,000,000 from Mr. Mills.

The contention that there was a change of attitude towards Mr. Mills after the disposition of the

Peoples Company's case in this court and the quo warranto in the Supreme Court of Illinois, is utterly disproved by the testimony of Mr. Meagher. He testified (Rec., p. 267) that on December 5, 1905, when the application of Mr. Guthrie for a preliminary injunction in favor of Mr. Mills against the Peoples Company came up before Judge Grosscup he was in court but did not say a word either for or against the granting of the writ; and further:

> "Q. Were you opposed or were you not opposed to the granting of that injunction? A. I was absolutely neutral.
> "Q. Indifferent? A. I was neutral."

No controversy is more bitter than a *real contest* between the majority and minority stockholders of a corporation with reference to its policy. The bill of complaint of Mr. Mills made the most serious charges of neglect of duty on the part of the officers and directors of the Peoples Company.

Is it possible that Mr. Meagher, the attorney for the Peoples Company, had absolutely no ideas on December 5, 1903, when the application for a preliminary injunction against the directors and stockholders of his Company was heard, as to whether or not those charges were well founded? Who ever heard of counsel for one of the contending factions in a real controversy between stockholders remaining absolutely "neutral"? Who ever heard of the counsel for a defendant being in open court when an application for an injunction against his clients was heard and considered, remaining absolutely silent and having no opinion and no preference as to whether or not that injunction should be granted?

III.

The undisputed evidence in this record shows that the corporate rights were being adequately protected by the officers of the Peoples Company at the time the bill of complaint was filed, and therefore a stockholder had no standing in the Federal Court.

Should we concede, for the sake of argument, that it has not been established in this case that Mr. Mills' suit was brought at the request of and for the benefit of the Peoples Gas Light and Coke Company, there is another reason why a Circuit Court of the United States had no jurisdiction over complainant's bill. On December 16, 1902, at the time Mr. Mills claims to have made a demand upon the Board of Directors of the Peoples Company to institute another suit against the City of Chicago, the case of the *Peoples Gas Light and Coke Company* v. *The City of Chicago*, was then pending in this court, and the injunction that had been issued in that case was in full force and effect. It was not until April 4, 1904, a year and a half thereafter, that that injunction became inoperative by the affirmance in this court of the said case of *Peoples Gas Light and Coke Company* v. *City of Chicago*.

The letter addressed to Mr. Mills by the Peoples Gas Light and Coke Company did not contain any intimation or statement that it was the intention of the officers and directors of the Peoples Company to comply with the ordinance of October 15, 1900, but said letter stated "*the board felt constrained under all the circumstances to decline to institute any further litigation at the present time.*"

Surely, no person could find fault with the officers

and directors of the Peoples Company, because they declined to institute any further litigation against the City of Chicago while the Peoples Company's rights were adequately protected by an injunction that was then in full force and which continued in force for more than a year and a half thereafter.

The minutes of the Directors' meeting held on January 29, 1903, contained the following entry (Rec., p. 278):

> "Counsel advised the Board that in his opinion the only safe course to be pursued, so far as practicable, was to defer action until the Supreme Court of the United States shall have finally decided upon the merits of the case brought by this Company now pending upon appeal to that court, notwithstanding that the result in that case might not be conclusive upon the questions involved in this ordinance."

It will be noted that the Board of Directors did not refuse to institute any further suit to contest the validity of the 75 cent gas ordinance, but they merely asserted that while the rights of the Peoples Company were being adequately protected by the pending suit, it was unwise to institute another suit.

If the exercise of a sound, honest and reasonable discretion on the part of the managers of this corporation required the institution of a suit in the state courts, for the purpose of restraining the enforcement of this ordinance on the ground of a want of power in the city to regulate the price of gas, that action was unnecessary, so long as an injunction was in force in this court. There is no allegation in the bill that any injury would result to the stockholders from a failure to act during the

time that they were protected by the injunction granted in *Peoples Company's* case, and the presumption is that the corporation would have acted as soon as the injunction issued in that case was dissolved.

Independently of any question of collusion, the undisputed evidence in this record shows that the corporate rights of the stockholders were adequately protected by the injunction in force in the case of the *Peoples Gas Light and Coke Company* v. *The City of Chicago*, then pending in this court. No stockholder had any standing in court to interfere, so long as no irreparable injury was suffered or threatened, and certainly not while the board of directors were proceeding in good faith and in the exercise of their best judgment in protecting the corporate rights. That provision is established by all the authorities.

The general rule is that a majority of the stockholders of a corporation, through its board of directors, are invested with the sole power to institute suits in behalf of the corporation and to redress corporate grievances and to determine when and in what courts such suits shall be instituted, and an individual stockholder has no standing for any such purpose.

> *Hawes* v. *Oakland*, 104 U. S., 450-57.
>
> Morawetz on Private Corporations, Sec. 238.

To the foregoing rule should be added the qualification that where a corporation refuses to act and that refusal is arbitrary and wrongful and without just cause and a demand is made upon the corpora-

tion to act and it still refuses, a stockholder may institute a suit in his own name in behalf of himself and other stockholders to protect corporate rights. The mere allegation that a demand has been made upon the corporation and it refuses to act is insufficient to authorize a stockholder to begin suit. It must further appear that the refusal was *wrongful,* constituting a *breach of trust,* for although the corporate officers may have acted erroneously in refusing to bring a suit, that is not sufficient to authorize the stockholders to proceed, so long as it appears that the corporate officers were acting in good faith, with reasonable diligence, and in the exercise of their sound discretion.

Memphis City v. *Dean,* 8 Wallace, 64-73.

Dodge v. *Woolsey,* 18 How., 345.

Wallace v. *Lincoln Savings Bank,* 89 Tenn., 633-35.

Samuel v. *Holladay,* 1 Woolw., U. S. C. Ct., 400.

Morawetz on Private Corporations, Sec. 244.

Hawes v. *Oakland,* 104 U. S., 457-460-462.

The bill discloses on its face that when this bill was filed on June 8, 1903, the bill of the Peoples Company was pending and undisposed of in this court, and a preliminary injunction that had been issued in the Circuit Court was then in full force and effect. In that bill the Peoples Company was attempting to enjoin the enforcement of this very ordinance and upon the very same grounds alleged in the bill in this case, and William D. Guthrie, the counsel for the complainant in this case, appeared in this court on January 20, 1904, as one of the

counsel for the Peoples Company and asserted in his brief, filed in this court, that the ordinance in question impaired the contract rights of the Peoples Company and that therefore it was entitled to relief in a Federal court.

In other words, William D. Guthrie was assisting the Peoples Company in asserting in this court that that company was entitled to full relief in a Federal court on the ground that their contract rights were being impaired by the ordinance in question and at the same time William D. Guthrie was maintaining the stockholder's bill in the Circuit Court in this case and basing his sole right to relief in behalf of the stockholder upon the proposition that the corporation had refused to bring an action in the state court to restrain the enforcement of the void ordinance. In other words, William D. Guthrie, as counsel for Mills, was asserting in the Circuit Court that William D. Guthrie, as counsel for the Peoples Company, was carrying on a suit in this court in a case where a Federal court was without jurisdiction. Jurisdiction by a Federal court to assert the invalidity of the ordinance in question because it impaired the contract rights of the Peoples Company was asserted as a ground of jurisdiction in the company's case. That very jurisdiction was simultaneously denied in the present suit and the absence of that jurisdiction was made the basis for a stockholder's suit, prosecuted by the same counsel and at the same time.

Although bill of complaint in this case was filed on June 8, 1903, and although the officers of this mighty corporation were then charged with failing to institute suits to protect the rights of the corpora-

tion, it is one of the singular incidents in this litigation that no answer to that bill was filed by the Peoples Company and no statement ever made, either admitting or denying the truth of the complainant's charges until November 24, 1905.

It is a matter of common knowledge that persons who are guilty are usually the loudest in protesting their innocence. The absolute silence of this corporation can be reconciled on no other theory than that in maintaining such silence it is acting pursuant to a collusive agreement with the complainant. The theory of complainant that because the Peoples Company filed a bill that was ultimately dismissed for want of jurisdiction, therefore a stockholder had the right to maintain a suit for the same grievance before the litigation had been disposed of in this court and while the rights of the corporation were fully protected by an injunction that was then in full force, is utterly without merit. A stockholder has no standing to redress corporate wrongs, except in a case where the corporation *wrongfully* refuses to act and where he will suffer *irreparable* injury if he is not permitted to maintain his suit.

The present bill was filed on June 8, 1903, and at that time the City of Chicago was restrained by the injunction in the *Peoples* case from enforcing the ordinance in question and that injunction was not dissolved until nearly a year thereafter, namely, on April 4, 1904. There is no allegation in this bill that the Peoples Company did not intend, in the event that it was unsuccessful in this court, to file a bill and secure a restraining order in the state court. Had it done that no one could argue that the corporation had been derelict in any of the duties that it owed to its stockholders.

The Circuit Court stated in its opinion, in *Mills* v. *City of Chicago*, 127 Fed., 731-36, that "the stockholder is entitled to the law, not to a mistaken view of the law; to an action that will lie, not to an action that must be dismissed for want of jurisdiction in the court resorted to." If, by that statement, it is meant that the stockholder has a right to demand of corporate managers infallibility, that they must always bring the right kind of a suit and in the right forum, and whenever they misconceive their remedy or err in matters of procedure, a stockholder may take the litigation out of the hands of the corporation and institute a suit in his own name, the proposition is not sustained by the authorities. The stockholder is entitled to insist that corporate managers shall exercise a reasonable degree of skill, that they must exercise good faith and a sound discretion, but that is the limit of a stockholder's rights.

If, the moment the managers of a corporation misconceive their remedy and institute a suit in the wrong forum, a stockholder can step in while that suit is pending and undisposed of and at a time when no irreparable loss is being suffered or threatened by the corporation, there would be no end to confusion in corporate management, for, should the first stockholder err in the form or the nature of his action, a logical application of the doctrine would lead to the conclusion that another stockholder could supplant him in another forum and there would be no way of determining who were the properly authorized representatives of the corporate rights.

The proposition that a stockholder cannot inter-

fere and take the management of litigation out of the hands of the managers of the corporation, unless the refusal of the corporation to act has been *wrongful*, accompanied by a *breach of faith*, is sustained by all the authorities.

The case of *Memphis City* v. *Dean*, 8 Wallace, 64, is directly in point. It was there held that a mere refusal on the part of the corporate managers to act was insufficient to authorize a stockholder to proceed in his own name, but the stockholder would have to show in addition to that, that there was a breach of duty on the part of the corporate managers, in other words, that the corporate managers had not exercised their sound discretion.

This court there said, page 73:

> "This refusal of the board of directors is essential in order to give to the stockholder any standing in court, as the charter confers upon the directors representing the body of stockholders the general management of the business of the company. *There must be a clear default, therefore, on their part, involving a breach of duty, within the rule established in equity, to authorize a stockholder to institute the suit in his own behalf or for himself and other stockholders who may choose to join.*"

The language of this court in *Hawes* v. *Contra Costa Water Co.*, 104 U. S., 450, is very pertinent to this controversy. There a suit was dismissed upon the ground of collusion, where the evidence was far less direct and conclusive than that contained in this record, and this court there said, page 452:

> "This practice has grown until the corporations created by the laws of the states bring a

large part of their controversies with their neighbors and fellow citizens into the courts of the United States for adjudication, instead of the state courts, which are their natural, their lawful and their appropriate forum. It is not difficult to see how this has come to pass. A corporation having such a controversy, which it is foreseen must end in litigation, and preferring for any reason whatever that this litigation shall take place in a Federal Court, in which it can neither sue its real antagonist nor be sued by it, has recourse to a holder of one of its shares, who is a citizen of another state. This stockholder is called into consultation, and is told that his corporation has rights which the directors refuse to enfore or to protect. He instantly demands of them to do their duty in this regard, which, of course, they fail or refuse to do, and thereupon he discovers that he has two causes of action entitling him to equitable relief in a Court of Chancery, namely: One against his own company, of which he is a corporator, for refusing to do what he has requested them to do; and the other against the party which contests the matter in controversy with that corporation. These two causes of action he combines in an equity suit in the Circuit Court of the United States, because he is a citizen of a different state, though the real parties to the controversy could have no standing in that court. If no non-resident stockholder exists, a transfer of a few shares is made to some citizen of another state, who then brings the suit. The real defendant in this action may be quite as willing to have the case tried in the Federal Court as the corporation and its stockholder. If so, he makes no objection, and the case proceeds to a hearing. Or he may file his answer denying the special grounds set up in the bill as a reason for the stockholder's interference at the same time that he answers to the merits. In either event the whole case is prepared for hearing on the merits, the right

> of the stockholder to a standing in equity receives but little attention, and the overburdened courts of the United States have this additional important litigation imposed upon them by a simulated and conventional arrangement, unauthorized by the facts of the case or by the sound principles of equity jurisdiction."

The contention that a stockholder can institute a suit the moment that the corporate managers err in the exercise of their judgment is clearly disproved by the following language, quoted by this court from Angell and Ames on Corporations, as laying down the correct rule, in *Hawes* v. *Contra Costa Water Co.*, 104 U. S., 450:

> "Though the result of the authorities clearly is, that in a corporation, when acting within the scope of and in obedience to the provisions of its constitution, the will of the majority, clearly expressed, must govern, yet beyond the limits of the act of incorporation the will of the majority cannot make the act valid, and the power of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation are employing their statutory powers for the accomplishment of purposes not within the scope of their institution. *Yet it is to be observed that there is an important distinction between this class of cases and those in which there is no breach of trust, but only error and misapprehension of simple negligence on the part of the directors.*"

In *Huntington* v. *Palmer*, 104 U. S., 482, it was insisted by the complainant that the mere fact that a tax was illegal and that the directors failed to oppose its payment gave a stockholder the right to file a bill in the name of the corporation. The court denied the efficacy of that contention and said:

> "There is not, as in the case of *Dodge* v. *Woolsey* (59 U. S., 331, XV, 401), any averment that this tax is so burdensome as to be destructive of the corporation itself; *nor of any fraud on the part of the board of directors, nor anything to show that their decision not to resist the tax is unwise, or opposed to the best judgment they could exercise in the matter.*"

Continuing, the court said:

> *"There is nothing to repel the reasonable presumption of parties improperly and collusively made in order to invoke the jurisdiction of the Federal Court."*

If, without any proof, the court, merely from the face of the bill, drew the reasonable presumption of parties improperly and collusively made, in order to invoke the jurisdiction of the Federal Court in the *Huntington* case, *supra*, it certainly is not too much to ask this court to invoke the same rule where the evidence establishes that collusion and improper joinder of parties beyond a reasonable doubt.

In *Corbus* v. *Alaska Treadwell Gold Mining Co.*, 187 U. S., 462, this court said, quoting from *Hawes* v. *Oakland*, 104 U. S., 450:

> "We understand that doctrine to be that to enable a stockholder in a corporation to sustain in a court of equity, in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit—
>
> "Some action, or threatened action, of the managing board of directors or trustees of the corporation which is beyond the authority conferred on them by their charter or other source of organization;

"Or such a fraudulent transaction completed or contemplated by the acting managers, in connection with some other party, or among themselves, or with other shareholders, as will result in serious injury to the corporation, or to the interests of the other shareholders;

"Or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders;

"Or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity.

"Possibly other cases may arise in which, to prevent irremediable injury, or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases.

"But, in addition to the existence of grievances which call for this kind of relief, it is equally important that, before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show to the satisfaction of the court that he has exhausted all the means within his reach to obtain, within the corporation itself, the redress of his grievances, or action in conformity to his wishes. He must make an earnest, not a simulated, effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. (See, also, *Detroit* v. *Dean*, 106 U. S.,

537-542; 27 L. Ed., 300, 302; 1 Sup. Ct. Rep., 560; *Quincy* v. *Steel*, 120 U. S., 241; 30 L. Ed., 624; 7 Sup. Ct. Rep., 520.)

"While this case is unlike that in that it does not attempt to transfer from a state to a Federal court a controversy which really belongs in the former,—there being none other than Federal courts in the territory,—yet the principle is the same, for it is an effort to secure for the benefit of the corporation an injunction which it could not itself obtain, and which no individual similarly situated can obtain.

"Immediately after announcing the decision in *Hawes* v. *Oakland*, 104 U. S., 450, *sub nom. Hawes* v. *Contra Costa Water Co.*, 26 L. Ed., 827, this court promulgated an additional equity rule (Rule 94):

" 'Every bill brought by one or more stockholders in a corporation against the corporation and other parties, founded on rights which may properly be asserted by the corporation, must be verified by oath, and must contain an allegation that the plaintiff was a shareholder at the time of the transaction of which he complains, or that his share had devolved on him since by operation of law; and that the suit is not a collusive one to confer on a court of the United States jurisdiction of a case of which it would not otherwise have cognizance. It must also set forth with particularity the efforts of the plaintiff to secure such action as he desires on the part of the managing directors or trustees, and, if necessary, of the shareholders, and the causes of his failure to obtain such action.' "

Continuing the court said:

"It must not be understood that a mere technical compliance with the foregoing rule is sufficient, and precludes all inquiry as to the right of the stockholder to maintain a bill against the corporation. This court will examine the bill in its entirety, and determine whether, under all

the circumstances, the plaintiff has made such a showing of wrong on the part of the corporation or its officers and injury to himself as will justify the suit. *The directors represent all the stockholders, and are presumed to act honestly and according to their best judgment for the interest of all. Their judgment as to any matter lawfully confided to their discretion may not lightly be challenged by any stockholder or at his instance submitted for review to a court of equity. The directors may sometimes properly waive a legal right vested in the corporation in the belief that its best interests will be promoted by not insisting on such right. They may regard the expense of enforcing the right or the furtherance of the general business of the corporation in determining whether to waive or insist upon the right. And a court of equity may not be called upon at the appeal of any single stockholder to compel the directors or the corporation to enforce every right which it may possess, irrespective of other considerations. It is not a trifling thing for a stockholder to attempt to coerce the directors of a corporation to an act which their judgment does not approve, or to substitute his judgment for theirs.*"

The same rule was laid down in *Smith* v. *Prattville Manufacturing Company*, 29 Ala., 503, where the court said, speaking of the action of the directors, page 508:

"There is no violation of the charter and constitution, and no proof of any fraud, wilful neglect, or breach of a known duty, or bad faith, in that exercise of their discretion. Their action was certainly nothing more than a mere error of judgment. There is, therefore, no ground upon which to rest the jurisdiction of the Court of Chancery to interfere with their discretion or with its exercise. (*Dodge* v. *Woolsey*, and other authorities cited, *supra; Ware* v. *The*

Grand Junction Water Works Co., 2 Russell & Mylne, 470.)"

In *Wallace* v. *Lincoln Savings Bank*, 89 Tenn., 632, the precise question here was presented before the court. The court there said, page 635:

> "It must therefore appear, before complainant will be suffered to carry on such a suit, that the corporation, or those authorized to represent it, have been requested to sue, and that they have *wrongfully* (the underscoring is by the court) refused to bring the suit.
>
> "It by no means follows that the mere refusal of the corporation to bring suit will authorize any stockholder dissatisfied with such decision to himself conduct the suit. A very wide discretion is necessarily reposed in the directors of a corporation. It is not the duty of the managers of such associations to bring suit upon every supposed wrong or injury to the corporation. If it were so strangers could never know when a settlement, compromise or adjustment was a finality if the matter was subject to be overhauled at the suit of any discontented shareholder. So a suit might appear so desperate, or be so expensive, or, for good reasons, impolitic, that directors might, in the exercise of a sound discretion, deem it unwise to engage in litigation. In such case, if the refusal be in good faith, the courts will rarely suffer a shareholder to overturn such decision by entertaining his suit, for the same cause of action. To authorize his suit, the refusal of the corporation to sue must appear to have been wrongful."

Again, Morawetz, in his work on Private Corporations, Vol. 1, Sec. 244, says:

> "It is often a matter involving the exercise of much judgment, whether or not it be expedient, in a given case, to begin a litigation on

account of an actionable injury. It is not the duty of managing agents of a corporation to go to law immediately whenever a wrong has been done to the corporation. The advisability of suing for redress, and the time and manner of proceeding, are largely intrusted to their judgment; and it is their duty to give the corporation the benefit of their best judgment in this respect. The refusal of the agents of a corporation to institute legal proceedings on its behalf, even when requested by its shareholders, may possibly be a judicious exercise of the discretion which was conferred upon them by the charter. This discretionary power confided to the agents of a corporation can not be usurped by its shareholders; and therefore the courts will not interfere at the suit of a shareholder to redress an injury suffered by the corporation, merely because its managing agents have in good faith refused to begin a suit in the name of the corporation."

The opinion of Justice Miller in *Samuel* v. *Holladay*, 1 Woolw., U. S. C. Ct., 400, reads as though it was written to fit the facts of this case. There the court said:

"It would be a doctrine attended with very serious consequences if every individual shareholder, assuming the place of the corporation, could decide for it when action should be brought to vindicate its supposed right. Each one of the shareholders might elect to claim a remedy, and resort to a tribunal different from those chosen by every other, and use the courts of equity to enforce his views, regardless of its duly constituted officers and all other parties having interests, rights, and powers equal to his own. In such a struggle the real interests of the corporation might be entirely sacrificed."

Within all the authorities above quoted, it is plain

that a stockholder has no right to interfere and take the management of litigation out of the hands of the board of directors of a corporation, so long as its board of directors are honestly and in good faith and with reasonable diligence, attempting to protect the corporate rights, especially where no irreparable loss is being sustained by the corporation.

Law, unlike mathematics, is not an exact science. It is often difficult to determine what the law is on any given subject until the petition for a rehearing has been denied in the court of last resort. The judges of this court quite frequently disagree on questions concerning which the judges of the lower court entertain no doubt. In view of these facts, to say that a stockholder is entitled to the law and that if the corporate managers do not always take the right course he may take the management of the litigation into his own hands, is to assert the proposition that no matter how competent and capable is the lawyer the corporation employs, if that lawyer, in the exercise of the highest skill and best judgment, misconceives the forum in which the suit is to be brought or the nature of the action, then the corporate managers must step aside and leave the suit to be managed by a stockholder. If that stockholder makes a misstep he in turn must give way to another stockholder. A conclusion that leads to consequences so absurd must necessarily be erroneous. This case presents a forcible illustration of the fallacy of such logic. Corporate managers can only act in legal matters through lawyers. It would appear that if they retained the best legal talent obtainable, they have done enough. Here William D. Guthrie, as counsel for the corporate managers, asserts in this court that a Federal court has jurisdiction in this matter on the ground that

contract rights of the corporation were impaired by the ordinance in question. We are now told that that assertion of Mr. Guthrie is unfounded and we are told that because the corporate managers persisted in prosecuting that suit in this court upon the advice and under the management of Mr. Guthrie, therefore the corporate managers were neglectful of the duties they owed to stockholders, and we are told that Mr. Mills, the complainant in this case, can retain the very same Mr. Guthrie and base the jurisdiction of a Federal court to grant relief in Mills' behalf upon the proposition that the corporate managers neglected the corporate interests, when they, relying upon Mr. Guthrie's advice, persisted in carrying the case through this court instead of instituting a new action in the state courts.

The language of this court in *Lehigh Mining & Mfg. Co.* v. *Kelly*, 160 U. S., 343, reads as though it was written to fit the facts of this case:

> "If this action were not declared collusive, within the meaning of the act of 1875, then the provision making it the duty of the Circuit Court to dismiss a suit, ascertained at any time to be one in which parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable by that court, would become of no practical value, and the dockets of the Circuit Court of the United States will be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance."

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